



April 18, 2001

Mr. Jesus Toscano, Jr.
City of Dallas
City Hall
1500 Marilla
Dallas, Texas 75201

OR2001-1555

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 146161.

The City of Dallas (the "city") received a request for a tape recording of a hearing and other information relating to the termination of an employee of the Dallas Fire Department. The city has released some of the requested information. You claim that the remaining information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

We first note that the submitted information appears to be subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). Thus, section 552.022(a)(1) requires the release of a completed investigation, unless information relating to the investigation is excepted from disclosure under section 552.108 or is expressly confidential under other law.

The city is concerned that the requested tape recording may be confidential under section 552.101 of the Government Code in conjunction with the Open Meetings Act, chapter 551 of the Government Code.¹ Section 551.104 of the Government Code makes the tape recording of a properly closed meeting confidential. An audiotape recording of a closed meeting is available for public inspection and copying only under a court order. *See* Gov't Code § 551.104; Open Records Decision No. 495 at 4 (1988) (audiotape recordings of closed meetings are confidential unless court rules otherwise). Thus, such information cannot be released to a member of the public in response to a request for information under the Public Information Act, and the Open Meetings Act does not permit the Office of the Attorney General to review the confidential agendas and tapes. *See* ORD No. 495 (1988). Furthermore, section 551.146 of the Government Code provides that it is a criminal offense to disclose an audiotape recording of a closed meeting to a member of the public.

You inform this office that the submitted audiotapes pertain to an appeal to the City of Dallas Civil Service Trial Board from a termination of employment. You explain that section 34-40(j) of the Dallas City Code permits the appealing employee to request that the hearing, the trial board's deliberations, or both be closed to the public. You correctly note that section 551.074 of the Government Code does not require a governmental body to conduct an open meeting to deliberate the dismissal of an employee unless the employee requests a public hearing. *See* Gov't Code § 551.074(a)(1), (b). You state that the employee requested that one portion of the proceeding be closed and that the chairperson of the trial board called a closed session for those deliberations. But you further inform us that the city is unable to determine whether the proceeding to which the audiotapes pertain was lawfully closed. We therefore advise the city that, if the tape recording pertains to a properly closed meeting under the Open Meetings Act, then the recording is confidential under section 551.104 of the Government Code and must not be released to the requestor. But if the proceeding to which the recording pertains was not a properly closed meeting under the Open Meetings Act, then you must release the tape, as the city has asserted no other exception to its disclosure.

You claim that other responsive information is confidential under the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

¹Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and thus protects information that is made confidential by another statute.

Occ. Code § 159.002(b), (c). The MPA includes provisions that govern the disclosure of information that it encompasses. *See id.* §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Public Information Act.²

You represent to this office that the documents submitted as Exhibit C involve laboratory drug test results that were prepared under the supervision of a physician. You further inform us that the documents submitted as Exhibit D “contain information that is directly derived from the medical records in Exhibit C.” Upon review of the submitted records, we conclude that one document, which we have marked, is governed by the Medical Practice Act. That document is confidential and must be withheld from the requestor, unless the Medical Practice Act permits its release.

You also raise section 552.101 of the Government Code in conjunction with the common law right to privacy. Information must be withheld under section 552.101 in conjunction with common law privacy when (1) the information is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You claim that the common law right to privacy encompasses all of the information submitted as Exhibits C and D and portions of Exhibit E. We have considered your arguments and reviewed that information. We conclude, however, that the information at issue relates to matters of legitimate public interest. Therefore, the city may not withhold that information under section 552.101 in conjunction with common law privacy. *See Open Records Decision Nos. 405 at 2 (1983) (stating that information relating to manner in which public employee performed his or her job cannot be said to be of minimal public interest), 423 at 2 (1984) (stating that information may not be withheld under common law privacy if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release of the information on grounds that it is highly intimate or embarrassing), 444 at 5 (1986) (stating that public has legitimate interest in knowing reasons for dismissal, demotion, or promotion of a public employee).*

Lastly, we note that Exhibit E contains information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee, as well as information revealing whether the employee has family members, *if the current or former employee requested that this information be kept confidential under section 552.024*. *See Open Records Decision Nos. 622 (1994), 455 (1987)*. However, you may not withhold this information in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open

²*See Open Records Decision No. 598 (1991)*. The Seventy-sixth Legislature repealed the predecessor statute, article 4495b of Vernon's Texas Civil Statutes, in enacting the Occupations Code. *See Act of May 13, 1999, 76th Leg., R.S., ch. 388, §§ 6, 7, 1999 Tex. Gen. Laws 1431, 2439-40*. The legislation was a non-substantive codification.

Records Decision No. 530 at 5 (1989). The city must withhold information that is protected by section 552.117(1) *if the employee to whom that information pertains made a timely election under section 552.024.*

In summary, the city may withhold the audiotapes only if they pertain to a properly closed meeting under the Open Meetings Act, chapter 551 of the Government Code. One of the submitted documents is confidential and must be withheld under section 552.101 of the Government Code in conjunction with the Medical Practice Act, unless the Medical Practice Act permits its release. Personal information relating to the former city employee may be excepted from disclosure under section 552.117 of the Government Code. The city must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

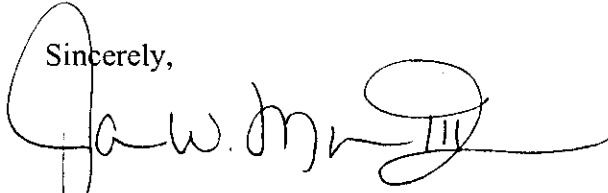
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large loop at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/tr

Ref: ID# 146161

Encl: Marked documents

cc: Ms. Ardita L. Vick
Assistant Disciplinary Counsel
State Bar of Texas
Regency Plaza
3710 Rawlins, Suite 800
Dallas, Texas 75219
(w/o enclosures)